UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNIVERSAL CITY STUDIOS, INC.,

Plaintiff,

-against-

NINTENDO CO. LTD. and
NINTENDO OF AMERICA, INC.,

Defendants.

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82 Civ. 4259
(RWS)

PLAINTIFF'S SUPPLEMENTAL TRIAL BRIEF

Of Counsel

Douglas C. Fairhurst
Mary D. Faucher
Lawrence C. Fox

TOWNLEY & UPDIKE
CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, N. Y. 10174

TELEPHONE
(212) 682-4567

branch of unfair competition are preempted . . . ." Warner Bros. Inc. v. American Broadcasting Co., 720 F.2d 231, 247 (2d Cir. 1983).*

Of course, Nintendo does not and cannot claim that Universal's agreements with Coleco, Atari and Ruby-Spears are infringements of its copyright in Donkey Kong. It is axiomatic that "[a]bsent copying there can be no infringement of copyright." Mazer v. Stein, 347 U.S. 201, 218 (1954) (footnote omitted). Certainly, Universal's agreements with Nintendo's licensees, based on Universal's assertion of rights in King Kong, cannot be considered acts of copying.

In sum, Nintendo cannot make out a claim against Universal for unjust enrichment or misappropriation, and judgment should be entered for Universal on this counterclaim as a matter of law.

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* Nor can Nintendo avoid preemption by labeling its misappropriation claim an unjust enrichment/quasi contract claim, basing its position on Werlin v. Reader's Digest Association, 528 F. Supp. 451 (S.D.N.Y. 1981). The unjust enrichment claim in that case was not preempted because plaintiff alleged the taking of "an idea," something not within the subject matter of copyright.